United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original

75-2106

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P/S

To be Argued by
ARLENE R. SILVERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. FRED EDWIN JOHNSON,

Appellant,

-against-

VINCENT R. MANCUSI, Superintendent, Attica Correctional Facility,

Appellee.

----------X

Docket No. 75-2106

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. :
FRED EDWIN JOHNSON, :

Appellant, :

-against- : Docket No. 75-2106

VINCENT R. MANCUSI, Superintendent, :
Attica Correctional Facility, :

Appellee. :

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BRIEF FOR APPELLEE

Questions Presented

1. Does an erroneous sentence estimate by defense counsel entitle appellant to habeas corpus relief?

2. Was appellant denied the effective assistance of counsel where he was represented by experienced, retained counsel who succeeded in obtaining a plea for appellant to a reduced charge of a multicount indictment in the face of overwhelming evidence against him?

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York, dated June 10, 1975 (Duffy, J.) which denied appellant's application for a writ of habeas corpus.

Facts

Appellant was convicted along with two co-defendants on his plea of guilty of the crimes of conspiracy to bribe public officers (a misdemeanor) and operating a policy business (a felony) in the Supreme Court, New York County, on June 22, 1966 (Gellinoff, J.) and was sentenced to 1 year in the penitentiary on the misdemeanor and 1 year and 6 months to 3 years on the felony count.* The sentences were to run consecutively, with the misdemeanor sentence to run first.

The judgment of conviction was affirmed without opinion by the Appellate Division, First Department on March 9, 1967 (27 A D 2d 904) and leave to appeal was denied on April 19, 1967.

*Petitioner has served these terms in full and is no longer in State custody.

In May of 1967 the three co-defendants brought a coram nobis proceeding in which they claimed that they plead guilty as a result of an opinion by their attorney that they would not receive a sentence in excess of several months.* The petition was denied without a hearing by Justice Gellinoff on May 18, 1967. None of the defendants appealed this decision.

Subsequently, appellant and his co-defendants sought habeas corpus relief in the Court claiming that they had been "assured" by the sentencing court that this sentence would not exceed six months. This Court (Tyler, J.) denied the application for failure to exhaust (Docket No. 67 Civ. 3545).

Thereafter, appellant and his co-defendants brought a second coram nobis in October, 1967 in which they claimed: (1) that their attorney advised them that there was a guarantee of a sentence of no more than six months; and (2) that they were ineffectively represented by counsel. An exhaustive hearing was held before Justice Carney, following which the application was denied.

*A copy of the coram nobis motion was submitted herewith to the Court as an Exhibit.

Prior to any appeal, a second application for habeas corpus was made to this Court and was denied by Judge Weinfeld (68 Civ. 1114). Only appellant sought to appeal the second coram nobis judgment. The judgment was affirmed by the Appellate Division, First Department without opinion on April 2, 1969 (32 A D 2d 614). Leave to appeal was apparently denied according to appellant.

Thereafter, appellant brought the application for a writ of habeas corpus which is the subject of this appeal. In the application, appellant alleged that his attorney promised him he would only receive a six months prison term and that he was ineffectively represented by counsel.

The Coram Nobis Hearing

Appellant testified that although he was represented by Morris Levy, Esq., at the time of his change of plea (184)* he pleaded guilty because of a representation by his co-defendant's attorney, Nathan Kestenbaum, that the judge promised that the sentence would not be more than 6 months (185-193).

*Numbers in parentheses refer to the page number of the hearing minutes borrowed from the Supreme Court and submitted to this Court.

Appellant testified that Mr. Kestenbaum told him that he played golf and bridge with the judge and that "they socialized with one another, from one home to the other." (251).

Appellant stated that he did not believe the promises even at the time of the plea (271), but he said that he was pressured because Mr. Kestenbaum told him that the District Attorney had enought evidence on him so that if he went to trial he would be "wasted" and "buried" (188-190).

Appellant also testified that prior to his pleading he tried to say something to the Court, but a Court attendent put his hand over appellant's mouth and told him, "You cannot do this here." (265-266). [He also said this occurred after the plea (206)].

At the time of the sentence, appellant stated he agreed to be represented by Mr. Kestenbaum when Mr. Levy was not present (278). He said that Mr. Kestenbaum at that time told the Court that appellant wanted to withdraw his plea, but didn't tell him why (205). When appellant tried to speak one of the attendants put his hand over his mouth and told him, "You cannot do that here." (206).

NATHAN KESTENBAUM, ESQ. testified that he represented appellant's two co-defendants (362) and that when Mr. Levy was tied up at the time of sentence he represented appellant

also (363, 400). He said that he discussed the plea with appellant "because I felt I knew more of the facts than Mr. Levy did, and I joined in advising him also." (378).

The witness stated that he did not tell the defendant that he had a guarantee as to sentence (372, 407, 410); that he did not discuss the case with the judge outside the courtroom (369); and that he did not indicate to the defendant before the plea that he had spoken to the judge about the plea (378). He said that the only discussion as to possible sentence was as to their being treated as first felony offenders (377). He said that he did not tell the defendant that he had dinner with the judge at his home (381) or that he played golf or bridge with the judge (414). He did not see any Court attendant put his hand over appellant's mouth during the plea proceedings (415).

Mr. Kestenbaum stated that he was advised by the assistant district attorney handling the case of some of the evidence against the defendant (364), which included pictures taken of the "operation of the gambling ring" and testimony from an "undercover man" who "had been planted in their midst (366-67). He told the defendants that he was concerned about the case because of the felony counts and that "there were at least two felony counts that would warrant consecutive sentences, in addition to the misdemeanor count."

The witness told the defendants that based on his knowledge of Justice Gellinoff's sentencing philosophy, they would receive a sentence of probably not more than six months (395-397, 399). He gave the defendants his best estimate of what their sentence would be.

JUSTICE ABRAHAM GELLINOFF testified that he had an independent recollection on the case (420). He met Mr. Kestenbaum for the first time socially when they sat at the same table at a Bar Association dinner in the spring of 1966 (420). He also went to a cocktail party at Mr. Kestenbaum's house, at a time he believed to have been after the sentencing (421). He never discussed appellant's case outside the courtroom (423). The only understanding there was with respect to sentence was that the defendant would be treated as first felony offenders (426).

Opinion of the State Coram Nobis Court

Justice Carney found the defendants plea voluntary. He found that defendants were not coerced into pleading guilty but did so because Mr. Kestenbaum had convinced them that the People had a strong case and because they felt that they could gamble on his estimate of not more than six months which they assumed to be a promise.

Justice Carney further found that defendants were not denied the effective assistance of counsel. The Court stated that both men were experienced lawyers who for many years have, to the Court's knowledge, tried cases in the Criminal Courts. They were retained, not assigned counsel, and the Court concluded that the fact that at a later date a defendant may question or quarrel with the acts of an attorney does not establish a basis for coram nobis relief.

Opinion of the District Court

After reviewing the evidence at the coram nobis hearing and Justice Carney's opinion, the District Court found that the finding of the State Court that Kestenbaum gave only his best estimate must stand. While acknowledging that Justice Carney in his opinion did state that even if Johnson had been induced to plead guilty by some misrepresentation by defense counsel as to what the sentence would be, such misrepresentation would provide no basis for setting aside the plea, the District nonetheless found that Judge Carney's opinion read, in toto, held that Kestenbaum had merely made an estimate of the sentence appellant and his co-defendants would receive, which estimate they only assumed to be a promise.

The District Court observed that there was ample basis

in the record for Judge Carney's conclusion, that Judge Carney had viewed the demeanor of the witnesses and chose to credit Kestenbaum's testimony. Most importantly there was appellant's initial coram nobis petition in the state court wherein appellant had asserted only that Kestenbaum's estimate or opinion of the sentences they would receive had been erroneous. Additionally there was the fact that the defendants had told Justice Gellinoff at the time of plea that no promises had been made.

Alternatively, the District Court, which observed that appellant had elected to stand upon the state court record, concluded upon a review of the record and in light of Judge Carney's findings after a full hearing that appellant had not met his burden in the District Court of proving that the circumstances reasonably justified his alleged mistaken impression that a promise of leniency had been made by the Judge.

As for Johnson's second claim, i.e., that he was denied the effective assistance counsel, the District Court found that appellant had failed to meet his burden of showing that counsel's conduct was such as to "shock the conscience of the court" or make the proceedings a mockery of justice.

The Court noted that counsel alleged failure to emphasize that six months was only his estimate is significantly

different from counsel's affirmative misrepresentation that a promise of leniency has been made. Moreover, Judge Duffy found that Johnson made very little effort, if any, to address the Court directly. The Court stated that a sentence estimate by defense counsel was insufficient to challenge the plea and thus Kestenbaum's failure to articulate with specificity Johnson's reasons for wanting his guilty plea withdrawn, did not establish an ineffective assistance claim.

ARGUMENT

THE STATE TRIAL COURT, AFTER A FULL AND FAIR HEARING, HELD THAT APPELLANT'S PLEA OF GUILTY WAS VOLUNTARILY AND KNOWINGLY ENTERED ON ADVICE OF COMPETENT COUNSEL AND APPELLANT HAS FAILED TO MEET HIS BURDEN OF DEMONSTRATING THAT SUCH FINDING WAS ERRONEOUS.

A.

Appellant had a full and fair hearing in the New York Courts on his claims that his attorney promised him a six month sentence and that he was denied the effective assistance of counsel because his counsel pressured him into pleading guilty and did not fully explain the basis upon which he sought to withdraw his plea. At the conclusion of such hearing, Justice

Carney of the New York State Supreme Court concluded that

> "The defendants pleaded guilty, not because they were coerced into doing so, or did so involuntarily, but because Mr. Kestenbaum had convinced them that the People had a strong case and because they felt they could safely gamble on his alleged friendship with the judge and his estimate of a sentence not exceeding six months which they assumed to be a promise."

It is well established in this Circuit that an estimate by defense counsel does not render a guilty plea involuntary. McMann v. Richardson, 397 U.S. 759, 774 (1971); U.S. ex rel. La Fay v. Fritz, 455 F. 2d 297 (2d Cir., 1972), cert. den. 407 U.S. 923 (1972).

Moreover, such factual conclusion by the State Court Judge is presumptively correct, 28 U.S.C. § 2254(d), and, at bar, is clearly supported by the state coram nobis record.

Neither at the time of plea nor at the sentence was there any indication that appellant or his co-defendants had

been mislead by any promise.* The claim of a "promise" or "guarantee" of six-month sentence was "conspicuously absent" from appellant's first coram nobis petition. In that application, appellant recited that his attorney had simply expressed his opinion that he would receive a six month sentence. Nor was there any support of a guarantee by Mr. Kestenbaum at the coram nobis hearing but rather a denial:

> "Well now, I gave them my best estimate. They misunderstood me, apparently. I never gave them a guarantee or anything of that sort. I want to make that very plain. I gave them my best estimate." (p.407)

Appellant and his co-defendants pleaded on the advice of their attorney that in the light of the evidence against them, this was the best course to follow as indeed it was.**

A review of the hearing minutes compels the conclusion that it is replete with exaggerations by appellant and his co-

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* A copy of the minutes of plea and sentence are contained in the volume with the hearing minutes which is being submitted to the Court.

** Appellant even stated that he did not believe the alleged plea promise (271).

defendants as to statements attributed to Mr. Kestenbaum. Thus appellant testified that Mr. Kestenbaum told him that he played bridge with Justice Gellinoff, that he lived near him, and that they socialized from one home to the other.

Mr. Kestenbaum categorically denied any such statements. He stated that he merely told the appellant that he knew Justice Gellinoff, that he had had dinner with him at a Bar Association meeting or Humanities Club meeting, and that he believed he was generally familiar with the Judge's sentencing philosophy. However, at no time did he ever guarantee or promise them a specific term. He gave them his best estimate.

As set forth by Assistant District Attorney McGuire at the time of sentence, the case against appellant and his co-defendants was exceptionally strong. They had been the subject of an intensive police operation aimed at reports of large scale corruption in the Police Department in connection with the enforcement of gambling laws. An undercover agent was recruited and briefed by the District Attorney's office and various teams of officers observed the day to day operations of appellant and his co-defendants. These officers were equipped with long range motion picture cameras that recorded the gambling activities of the defendants. In view of an apparently airtight case, the

appellant and his co-defendants were properly advised to plead to two counts of the multicount indictment avoiding conviction on all counts which would have carried a maximum term of at least 15 years.

Appellant in an attempt to circumvent the factual holding of Justice Carney argues that Justice Carney applied an improper standard in assessing the voluntariness of his plea. However, insofar as Justice Carney stated in his opinion that a misrepresentation by trial counsel as to sentence would form no basis for coram nobis relief, such statement was gratuitous, Justice Carney having already determined that Mr. Kestenbaum gave no more than an estimate as to sentence.

In any event, as Judge Duffy pointed out, appellant, in the District Court chose to stand on the state court record and had no additional evidence to offer to the District Court. Particularly significant here is appellant's failure in both the state and federal proceedings to establish or, at least, even suggest, the defenses he had to the charges in the indictment. In light of Justice Carney's opinion and the record before the District Court, Judge Duffy properly concluded that appellant had failed to meet his burden of proving that the circumstances surrounding the plea reasonably justified his alleged mistaken impression that a promise of leniency had been made by the Judge and that such alleged mistaken impression had, in fact, been the impetus for the plea.

B.

Appellant also argues that he was denied the effective assistance of counsel because Mr. Kestenbaum pressured him into pleading guilty and failed to inform the trial court of the exact reasons for his motion to withdraw his plea.

As the District Court pointed out, appellant's burden here is a heavy one. Counsel's conduct must have been such as would "shock the conscience of the court" or make the proceedings a mockery of justice. U.S. ex rel. Marcelin v. Mancusi, 462 F. 2d 36, 42-43 (2d Cir., 1972), cert. den. 410 U.S. 917 (1973).

Although Kestenbaum stated he did put pressure on the defendants to plead, it is apparent from the coram nobis hearing minutes that he was simply doing his job as an attorney in convincing his clients of the best path to follow in the face of an overwhelming case against them. Moreover, Mr. Kestenbaum's testimony at the hearing evinced a desire to help his clients who now found themselves under a longer jail sentence then he had originally estimated. The Courts have been rightly reluctant to accept a defense counsel's own assessment of his performance where his client has been convicted. "Every lawyer on a losing side of a case probably feels that if he had a little more time he might have done something else which would have been helpful," Sykes v.

Commonwealth of Virginia, 364 F. 2d 314, 316 (4th Cir., 1966), and statements such as these "must be considered cautiously lest defendants be granted an easy escape from justice." United States ex rel. Hardy v. Mc Mann, 292 F. Supp. 191, 195 (S.D.N.Y., 1968).

As for the claim that Mr. Kestenbaum failed to advance appellant's reasons for wanting to withdraw his plea, in view of the fact that Mr. Kestenbaum had made no more then a sentence estimate, he rightly concluded that such circumstance would not have been grounds for withdrawal of the plea. As Judge Duffy pointed out, if appellant made any effort to address the Court directly, he certainly did not make much of an effort. His testimony on this point was contradictory. At one point, he testified that he tried to speak at the time of plea but a Court officer put his hand over appellant's mouth. Yet, he also stated that this incident occurred at the time of sentence.

Appellant faced a long prison term on a multicount indictment. His attorney succeeded in obtaining a plea to one misdemeanor count and one felony. In the fact of a strong case against appellant, counsel's advice to plead was sound, and appellant has failed to establish that he was denied the effective assistance of counsel.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE, IN ALL RESPECTS, AFFIRMED.

Dated: New York, New York
October 3, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Arlene R Silverman being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for herein. On the 3rd day of Oct, 1975, she served the annexed upon the following named person :

Eleanor Jackson Piel, Esq
36 West 44th St
Ny Ny 1003

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Arlene R Silverman

Sworn to before me this
3rd day of Oct, 1975

Assistant Attorney General
of the State of New York